

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TRI-COUNTY CONCERNED CITIZENS	:	
ASSOCIATION, PATTY BRANN,	:	
KATHY BRILL, WILLIAM CRANSTON,	:	
HOLLY HARTSHORNE, and	:	
BARBARA MESSNER,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
RAYMOND CARR, MORGANTOWN	:	
PROPERTIES, INC., WILLIAM BETZ,	:	
JUDITH BETZ, ROBERT G. WILLIAMS,	:	
CAROLYN WILLIAMS, CHERYL	:	
CONKEL, and NEW MORGAN BOROUGH	:	NO. 98-CV-4184
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

December 11, 2000

Presently before the Court is Plaintiffs' Motion for Leave to Amend Complaint and Defendants' Response thereto, *et cetera*. The proposed complaint is the fourth complaint and the third amended complaint offered by Plaintiffs in this case. Defendants argue the instant motion should be denied because either Plaintiffs' Counsel's lapses of professionalism, intentional gamesmanship or both have raised issues of, *inter alia*, undue delay, bad faith, and prejudice. The Court agrees. In the Order accompanying this Memorandum, the Court will deny the instant motion and grant Plaintiffs leave to file Plaintiffs' December 7, 1998 amended complaint (the "Amended Complaint").

I. BACKGROUND

Plaintiffs filed this suit on August 10, 1998. The Court then granted Defendants' first motion to dismiss and soon thereafter denied Plaintiffs' Motion to Amend Complaint and for Reconsideration. Nearly one year later the Third Circuit reversed and remanded this case because it believed Plaintiffs asserted facts which warranted remand in the proposed Amended Complaint. Consistent with the Third Circuit's opinion, the Court granted Plaintiffs leave to file their Amended Complaint. Plaintiffs, however, filed a different amended complaint on March 13, 2000 (the "Second Amended Complaint"). Remarkably, the Second Amended Complaint failed to make the allegations which the Third Circuit relied upon in making its decision to remand.

Despite Plaintiffs' failure to follow the Court's order, Defendants filed a Joint Motion to Dismiss this Second Amended Complaint. In that motion, Defendants remonstrated the discrepancies between the two versions and the shortcomings of the Second Amended Complaint. Plaintiffs then filed their Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss in which they made four pertinent claims: 1) they "intended to file the [Amended Complaint] and simply filed a different version by mistake;" 2) they "would seek leave of Court to correct this error and to file the [Amended Complaint] consistent with the Court's previous decision;" 3) the "accidental" filing was caused by a "failure to properly store the changes in the computer file;" and 4) their memorandum referred to the "[Amended Complaint], since that complaint is the one the Court authorized Plaintiffs to file" even though Defendants' Motion to Dismiss was based on the Second Amended Complaint. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 2-3.

On October 4, 2000, the Court ordered Plaintiffs to file a motion for leave to file the Amended Complaint in an effort to square the pleadings with the Third Circuit's decision to remand and to square all motions and memorandums with each other. The Court also believed the Order was a generous opportunity for Plaintiffs to correct their errors without penalty and file the Amended Complaint as they maintained they intended. The Order explained to Plaintiffs their failure to comply would result in the Court proceeding with the case based on the Second Amended Complaint, essentially giving Plaintiffs a choice between the two amended complaints. Rather than choosing either of these two courses, Plaintiffs ignored the Order by filing a motion for leave to file a different amended complaint (the "Third Amended Complaint"). It is this motion the Court will deny but the Court will grant Plaintiffs leave to file the Amended Complaint within ten days.

II. DISCUSSION

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave can be denied, however, in the presence of "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party . . . , [or] futility of amendment. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); e.g., Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000). The Court believes Plaintiffs' actions give rise to three of these alternative grounds for denying a motion for leave: undue delay, bad faith, and prejudice.

A. Undue Delay

The Court believes Plaintiffs' mishaps and delays have placed an unwarranted burden on the Court and therefore have caused undue delay. See Adams v. Gould, Inc., 739 F.2d

858, 868 (3d Cir. 1984) (explaining that delay becomes undue when it places an unwarranted burden on the court). In Oran v. Stafford, 226 F.3d 275 (3d Cir. 2000), the Third Circuit upheld a district court finding of undue delay when (1) plaintiffs had already amended their complaint once, (2) the case was one and one half years old, (3) no discovery had been taken, and (4) plaintiffs had four months to file the proposed amended complaint. Oran, 226 F.3d at 291 (citing Oran v. Stafford, 34 F. Supp. 2d 906, 914 (D.N.J. 1999)). Similarly, in Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998), the Third Circuit affirmed a district court's denial of a motion for leave to amend for undue delay when (1) plaintiffs were permitted to file an amended complaint, (2) the district court accepted additional allegations made in a response to a motion to dismiss as a second amended complaint, and (3) plaintiffs had ample opportunity to plead their allegations properly and completely.¹

Several of the factors considered in these Third Circuit cases are present in the instant case. First, Plaintiffs have amended their complaint twice before this latest attempt, and by virtue of the October 4, 2000 Order, had a choice between moving forward with the Amended Complaint or the Second Amended Complaint. Second, the case is more than two years old. Third, Plaintiffs have had since March 14, 2000 to file the Amended Complaint and never did. That leave was granted nearly seven months prior to the October 4, 2000 Order, and despite Plaintiffs' disingenuous claims of not having possession of the Amended Complaint, the

1. In Rolo, the Third Circuit alluded to its decision in Gasoline Sales, Inc. v. Aero Oil Company, 39 F.3d 70 (3d Cir. 1994), which has language the Court believes is worth repeating as it is pertinent to this case. Rolo, 155 F.3d at 654. In Gasoline Sales, the Third Circuit affirmed a district court's refusal to grant leave to amend and reasoned: . . . as the district court stated, "three attempts at a proper pleading is enough" and a "plaintiff has to carefully consider the allegations to be placed in a complaint before it is filed." [Plaintiff] is not seeking to add claims it inadvertently omitted from its prior complaints or which it did not know about earlier. Rather [plaintiff] is modifying the allegations in hopes of remedying factual deficiencies in its prior pleadings Gasoline Sales, 39 F.3d at 74.

Amended Complaint has been available to Plaintiffs, if in no other form, as an exhibit to Defendants' April 7, 2000 Joint Motion to Dismiss. Fourth, Plaintiffs indicated to the Court in their May 2, 2000 Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss they mistakenly filed the Second Amended Complaint and would motion for leave to file the Amended Complaint. Again, they never did. Finally, the instant motion, which Plaintiffs filed in disregard of the October 4, 2000 Order, has prolonged, and, if accepted, would continue to prolong this litigation causing the Court to expend time and resources unnecessarily. The Court believes these facts are sufficient for a finding of undue delay.

B. Bad Faith

The Court believes Plaintiffs' Counsel's conduct is a clear example of bad faith. The Court reaches this conclusion when considering *inter alia* Counsel's delay in filing the instant motion for leave to amend, Counsel's failure to follow Court orders, and Counsel's disingenuous excuses for not following these orders. First, Counsel has delayed this litigation for several months by not filing a motion for leave to amend until after the Court issued its October 4, 2000 Order. The Court believes Plaintiffs could have filed the instant motion many months before the October 4, 2000 Order and failed to intentionally or, at the very least, unprofessionally. The primary difference between Plaintiffs' Third Amended Complaint and their Second Amended Complaint can be found in facts alleged in the Amended Complaint indicating the new information was available to Plaintiffs long before they petitioned for leave. See Friedman v. Transamerica Corp., 5 F.R.D. 115, (D.C. Del. 1946) (denying a motion for leave to amend when plaintiffs made a third request to amend and the new matter had been alleged in the first amended complaint but was not included in plaintiffs' second amended complaint); see

also 6 Wright, Miller & Kane, Federal Practice and Procedure § 1487 (2d ed. 1990) (explaining that delay alone may not result in denial of leave but that leave may be denied if the moving party had the information used in making the amendments at the time of earlier pleadings and there is no excuse for having failed to plead them). The Court also is concerned Plaintiffs intentionally filed the deficient Second Amended Complaint knowing Defendants would motion to dismiss it and knowing they intended to incorporate strategy developed from reviewing that motion to dismiss in the Third Amended Complaint. Whether Plaintiffs were acting strategically with a dilatory motive or simply lacked professionalism and respect for the Court and the parties, this delay appears to be the result of bad faith.

The second indication of Plaintiffs' Counsel's bad faith is his failure to follow Court orders. In a March 10, 2000 conference, the Court indicated it intended to grant Plaintiffs leave to file the Amended Complaint which inspired the Third Circuit's decision to remand. See March 14, 2000 Court Order ("Upon the agreement of the parties entered at conference . . . Plaintiffs are granted leave to file and serve their amended complaint . . ."). Counsel, by his own admission, understood this grant of leave to be directed toward the Amended Complaint and not just any amended version of the complaint. See Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 3. Nonetheless, Counsel filed the Second Amended Complaint instead of the Amended Complaint disregarding the Order and the terms agreed upon in conference.

Eight months later Counsel ignored another Court order. In the Court's October 4, 2000 Order, the Court, in no uncertain terms, ordered Plaintiffs to file a motion for leave to file the Amended Complaint. Instead, Counsel ignored the Order and motioned for leave to file

another version, the Third Amended Complaint. The Court believes Counsel's refusal to follow orders of the Court is an affront to the authority of the Court and a lack of professional responsibility which risks the rights of his clients. See Sweeney v. Saint Joseph's Hospital, 769 F. Supp. 747 (M.D. Pa. 1991) (relying on a plaintiff's failure to follow court orders as evidence of bad faith and a ground for dismissing the case).

The third indication of Plaintiffs' Counsel's bad faith is the disingenuous nature of the excuses offered to answer for his failure to follow orders. After failing to follow the first order, Counsel asserted the improper filing was an unintentional mistake caused by a failure to properly store changes in the computer file. See Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 2. Then, after not following the October 4, 2000 Order, Counsel again blamed computer problems claiming he had "inadvertently lost [the Amended Complaint] in the computer retrieval." See Plaintiffs' November 13, 2000 Reply Brief at 4. The Court finds no credibility in these excuses knowing a copy of the Amended Complaint was available in Defendants' second motion to dismiss, if not previous filings with the Court. Counsel's excuses are akin to the proverbial "the dog ate my homework" excuse.

Based on the foregoing, the inescapable conclusion is that Plaintiffs' Counsel exercised bad faith.

C. Prejudice

The Court believes Plaintiff's Counsel's conduct has prejudiced Defendants and a granting of the instant motion would prejudice Defendants even further. The Third Circuit requires a party trying to show prejudice in a Rule 15 context to demonstrate that its ability to present its case would be seriously impaired were amendment allowed. Dole v. Arco Chemical

Co., 921 F.2d 484, 488 (3d Cir. 1990) (citing Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989)). Although the Court does not believe Defendants have established prejudice that meets this standard specifically, it does believe a denial of Plaintiffs' motion is warranted when considering prejudice in light of the totality of the circumstances.

The following considerations illuminate this point. First, this latest amended complaint, if allowed, could potentially force Defendants to answer new factual allegations over two years after the inception of the case. Second, since the Third Circuit remanded the case one year ago, Plaintiffs have subjected Defendants to prolonged litigation, two unnecessary rounds of motions, and considerable financial expense. Third, the Court is unwilling to allow Plaintiffs to capitalize on their own failures by filing this most recent amended complaint which takes into account Defendants' second motion to dismiss, to which Plaintiffs failed to respond. See Sweeney v. St. Joseph's Hospital, 769 F. Supp. 747, 749 (M.D. Pa. 1991) (finding prejudice in the context of a dismissal for failure to comply with court orders when defendants would have to answer new allegations one-and-one half years after an original complaint was filed, defendants would be subjected to a fourth round of motions, and plaintiff's would have another opportunity to oppose previously unopposed motions to dismiss.) Finally, although they provide no concrete evidence, Defendants raise a reasonable concern that the prolonging of this case has maintained a cloud of uncertainty over the operations of the Borough, the rights of property owners within the Borough, and the rights of third parties who, although not before the Court, have investments tied to the Borough. The Court believes Defendants have been prejudiced, and will be prejudiced further if Plaintiffs are permitted to amend their complaint once again.

III. CONCLUSION

For all of the reasons set forth above, Plaintiffs' October 16, 2000 Motion for Leave to Amend Complaint will be DENIED.

An appropriate order follows.

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HOLLY HARTSHORNE, and	:	
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CONKEL, and NEW MORGAN BOROUGH	:	NO. 98-CV-4184
	:	
Defendants.	:	

ORDER

AND NOW, this 11th day of December, 2000, upon consideration of Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 46) and Defendants' Joint Response thereto (Docket No. 47) *et cetera*, it is **ORDERED** as follows:

- A. Plaintiffs' Motion for Leave to Amend Complaint is **DENIED**.
- B. Plaintiffs are **GRANTED** ten (10) days to file their December 7, 1998 amended complaint.

BY THE COURT:

RONALD L. BUCKWALTER, J.